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August 10, 1984

MEMORANDUM FOR FRED F. FIELDING

FROM: JOHN G. ROBERTS

SUBJECT: Solicitor General Filing in Secretary, United States Department of Education v. Betty-Louise Felton

Today the Solicitor General will file a jurisdictional statement before the Supreme Court to appeal the decision of the United States Court of Appeals for the Second Circuit in the above-referenced case. Title I of the Elementary and Secondary Education Act of 1965, 20 U.S.C. § 2701 et seq., established a program under which Federal funds are used to pay teachers for remedial reading, remedial mathematics, and English as a second language instruction. In enacting Title I, Congress specified that these programs were to be available to educationally deprived children in private schools as well as those in public schools. On July 9, 1984, the United States Court of Appeals for the Second Circuit, considering a case originating in New York, held that Title I was unconstitutional. The court ruled that Title I violated the Establishment Clause by authorizing use of federal funds to send public teachers into religious schools to carry on instruction.

In his filing today the Solicitor General contends that the Establishment Clause does not erect a per se barrier to sending public teachers to religious schools for remedial instruction, and that the facts of this case do not present the dangers of excessive entanglement between church and state that the Establishment Clause was designed to prevent. The Solicitor General notes that the Supreme Court has already agreed to hear School District of the City of Grand Rapids v. Ball, cert. granted, No. 83-990. That case, arising from the Sixth Circuit, concerns a state program similar in many respects to Title I. The Solicitor General recommends that the Court note probable jurisdiction in Felton (the equivalent to a grant of certiorari in an appeal), and consolidate the case with Ball.

Consistent with our usual practice in such cases, I have prepared a memorandum for Baroody, copy to Speakes, advising them of the filing.

Attachment

THE WHITE HOUSE

WASHINGTON

August 10, 1984

MEMORANDUM FOR MICHAEL E. BARODY
DEPUTY ASSISTANT TO THE PRESIDENT
DIRECTOR, PUBLIC AFFAIRS

FROM: FRED F. FIELDING
COUNSEL TO THE PRESIDENT

SUBJECT: Solicitor General Filing in Secretary, United States Department of Education v. Betty-Louise Felton

Today the Solicitor General will file a jurisdictional statement before the Supreme Court to appeal the decision of the United States Court of Appeals for the Second Circuit in the above-referenced case. Title I of the Elementary and Secondary Education Act of 1965, 20 U.S.C. § 2701 et seq., established a program under which Federal funds are used to pay teachers for remedial reading, remedial mathematics, and English as a second language instruction. In enacting Title I, Congress specified that these programs were to be available to educationally deprived children in private schools as well as those in public schools. On July 9, 1984, the United States Court of Appeals for the Second Circuit, considering a case originating in New York, held that Title I was unconstitutional. The court ruled that Title I violated the Establishment Clause by authorizing use of federal funds to send public teachers into religious schools to carry on instruction.

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cc: Larry Speakes

See Hochhurst for original (30 pages)

No. 83-990

In the Supreme Court of the United States

OCTOBER TERM, 1983

SCHOOL DISTRICT OF THE CITY OF GRAND RAPIDS, ET AL., PETITIONERS

v.

PHYLLIS BALL, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

REX E. LEE
Solicitor General

RICHARD K. WILLARD
Acting Assistant Attorney General

PAUL M. BATOR
Deputy Solicitor General

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1160

No.

REVISED BY

TO BE REVIEWED BY

In the Supreme Court of the United States

OCTOBER TERM, 1984

SECRETARY, UNITED STATES DEPARTMENT OF EDUCATION, APPELLANT

v.

BETTY-LOUISE FELTON, ET AL.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JURISDICTIONAL STATEMENT

REX E. LEE
Solicitor General

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8/8/84

RUSH

URGENT

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QUESTION PRESENTED

Whether Title I of the Elementary and Secondary Education Act of 1965, which authorizes federal funding of remedial education for all educationally deprived children in low-income areas, violates the Establishment Clause of the First Amendment insofar as it authorizes the funding of secular remedial classes taught by public school teachers under public school control on the premises of religious schools.

PARTIES TO THE PROCEEDING

The Secretary of Education and the Chancellor of the Board of Education of the City of New York were named as defendants and were appellees in the court of appeals. Yolanda Aguilar, Lillian Colon, Miriam Martinez, and Belinda Williams intervened as defendants in the district court and were appellees in the court of appeals. Betty-Louise Felton, Charlotte Green, Barbara Hruska, Meryl A. Schwartz, Robert H. Side, and Allen H. Zelon were the plaintiffs in the district court and appellants in the court of appeals.

In the Supreme Court of the United States

OCTOBER TERM, 1984

No.

SECRETARY, UNITED STATES DEPARTMENT OF EDUCATION, APPELLANT

v.

BETTY-LOUISE FELTON, ET AL.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-54a) is not yet reported. The opinion of the district court (App., *infra*, 55a-59a) is unreported. The opinion in *National Coalition for Public Education and Religious Liberty* v. *Harris* (App., *infra*,), on which the district court relied, is reported at 489 F. Supp. 1248.

JURISDICTION

The judgment of the court of appeals (App., *infra*, 104a-105a) was entered on July 9, 1984. A notice of appeal (App., *infra*, 106a-107a) was filed on August 2,

1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1252. See *Parker* v. *Levy*, 417 U.S. 733, 742-743 n.10 (1979).[1]

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[1] The court of appeals held that the Establishment Clause of the First Amendment forbids the expenditure of funds appropriated under Title I of the Elementary and Secondary Education Act of 1965, 20 U.S.C. 2701 *et seq.*, on remedial instruction for students of nonpublic religiously oriented schools, if that instruction occurs on the premises of those schools. As this Court has held (*Wheeler* v. *Barrera*, 417 U.S. 402, 422-423 (1974)) and as the court of appeals explicitly recognized (App., *infra*, 6a n.2, 24a), Title I authorizes such expenditures. Indeed, the legislative history of Title I shows that Congress specifically contemplated on-premises instruction (S. Rep. No. 146, 89th Cong., 1st Sess. 12 (1965)), and a regulation specifies, that such instruction is to be provided only "to the extent necessary to" satisfy the statutory mandate that comparable services be supplied to public and nonpublic school students (34 C.F.R. 200.73(a)).

We submit that the court of appeals has, therefore, "held [Title I] unconstitutional as applied to a particular circumstance" (*United States* v. *Darusmont*, 449 U.S. 292, 293 (1981)) and an appeal lies to this Court under 28 U.S.C. 1252. See *California* v. *Grace Brethren Church*, 457 U.S. 393, 404-407 (1982). Cf. *United States* v. *Rock Royal Cooperative, Inc.*, 307 U.S. 553 (1939). While the court of appeals did not explicitly state that Title I was unconstitutional as applied, such a determination "was a necessary predicate to the relief" that it granted (*United States* v. *Clark*, 445 U.S. 23, 26 n.2 (1980)).

We note that in *Flast* v. *Cohen*, 392 U.S. 83, 88-91 (1968), this Court held that a claim that New York City's Title I program violated the Establishment Clause—the same claim that is made by plaintiffs here—was properly brought before a three-judge court convened pursuant to 28 U.S.C. (1970 ed.) 2282. The interpretation of Section 2282 sheds light on the meaning of Section 1252 because Section 2282 provided for a three-judge court when an injunction was sought against the enforcement of an Act of Congress "on grounds of unconstitutionality" and both Section 1252 and Section 2282 were enacted as part of the same statute (Judiciary Act of 1937, ch. 754, §§ 2, 3, 50 Stat. 752.

If the Court determines that it lacks appellate jurisdiction in this case, we request that it treat this Jurisdictional Statement

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The relevant constitutional, statutory, and regulatory provisions are set out at App., *infra*, 108a-127a.

STATEMENT

1. On February 27, 1984, this Court granted certiorari in *School District of the City of Grand Rapids* v. *Ball*, No. 83-990, to consider whether it is a per se violation of the Establishment Clause for a local school district, pursuant to a state-funded enrichment and remedial educational program made available to all children in the district, to provide secular supplementary instruction to nonpublic school students on the premises of religiously oriented schools. The United States filed a brief *amicus curiae* in *Grand Rapids*,[2] pointing out that Title I of the Elementary and Secondary Education Act of 1965, 20 U.S.C. 2701 *et seq.*, authorizes federal grants-in-aid to local educational agencies for the purpose of improving the education of economically and educationally deprived children. Our brief explained that Title I "specifically requires that provisions be made for the participation of eligible students who attend nonpublic schools", and that "[m]any local educational agencies have met this requirement by providing Title I remedial education services to eligible children on the premises of nonpublic schools." 83-990 U.S. Br. 1-2. We noted that the validity of the Title I program is being litigated in various federal courts, and that "this Court's decision [in *Grand Rapids*] is likely to have a substantial impact on the lower courts' consideration of the somewhat analogous legal and factual issues presented in the pending Title I cases." 83-990 U.S. Br. 3.

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as a petition for a writ of certiorari (see 28 U.S.C. 2103) and grant the petition.

[2] We have sent copies of this brief to the appellees.

This case is one of the pending federal cases we identified in which the validity of the federal Title I program has been drawn into question. See 83-990 U.S. Br. 2. On July 9, 1984, the United States Court of Appeals for the Second Circuit held in this case that the Establishment Clause renders Title I unconstitutional insofar as it authorizes the inclusion of students of religiously oriented nonpublic schools in a program that makes on-premises remedial education available on an across-the-board basis to all public and nonpublic school children who are economically and educationally deprived. We now seek review of that decision.

2. Congress enacted Title I in order to "'bring better education to millions of disadvantaged youth who need it most'" (S. Rep. 146, 89th Cong., 1st Sess. 5 (1965) (citation omitted)).[3] For nearly two decades, Title I has provided federal funds "to local educational agencies serving areas with concentrations of children from low-income families" for the purpose of "expand[ing] and improv[ing]" local educational programs that help meet "the special educational needs of educationally deprived children" (20 U.S.C. 2701). Title I funds typically sup-

[3] Effective July 1, 1982, Title I was superseded by Chapter 1 of the Education Consolidation and Improvement Act of 1981, Pub. L. No. 97-35, 95 Stat. 464 (codified at 20 U.S.C. 3801 *et seq.*). Chapter 1 continues to provide federal financial assistance to meet the special educational needs of the educationally deprived children served under Title I (see 20 U.S.C. 3801), and its provisions concerning the participation of children in private schools are virtually identical to those of Title I. Compare 20 U.S.C. 2740 with 20 U.S.C. 3806. See also App., *infra*, 3a n.1. Because there are no material differences between the two statutes, and because the declaratory and injunctive relief ordered by the court of appeals (see *id.* at 54a) is not affected by the changes made by Chapter 1, this case is not moot. See, *e.g.*, *Schall* v. *Martin*, No. 82-1248 (June 4, 1984), slip op. 7 n.2. Like the court of appeals, we will continue to refer to the program as "Title I."

port programs such as remedial reading, remedial mathematics, and English as a second language (see H.R. Rep. 1137, 95th Cong., 2d Sess. 6 (1978)).

Local educational agencies seeking Title I funds submit an application, describing the programs for which funding is sought, to a state agency for approval. The state agency must file certain assurances with the Department of Education, which has authority to administer the program at the federal level and distribute appropriated funds. 20 U.S.C. 3802, 3871, 3876. The statute specifies criteria that a local program must meet in order to qualify for Title I funds. 20 U.S.C. 3805(b). In particular, the program must channel funds to students (i) who are educationally deprived, that is, who perform at a level below normal for their age, and (ii) who live in an area that has a high concentration of families with incomes below the poverty level. 28 U.S.C. 3805(b).

Congress was aware that many families in low-income urban areas send their children to nonpublic schools. See *Wheeler* v. *Barrera*, 417 U.S. 402, 405-406 (1974). Congress made it clear that students are not to be discriminated against in the provision of Title I benefits because they attend nonpublic schools: the statute requires each recipient local agency to ensure that "[e]xpenditures * * * for educationally deprived children in private schools shall be equal (taking into account the number of children to be served and the special educational needs of such children) to expenditures for children enrolled in the public schools" (20 U.S.C. 3806(a); see also *Wheeler*, 417 U.S. at 420-421; S. Rep. 146, *supra*, at 11-12).

In particular, this Court has already recognized that Title I authorizes funds for remedial instruction of nonpublic school students, by public school teachers, on the premises of nonpublic schools. See *Wheeler*, 417 U.S. at 422-423. The statute and its implementing regu-

lations carefully specify the conditions under which such instruction will be permitted. The legislative history of Title I states that "public school teachers will be made available to other than public school facilities only to provide specialized services which contribute particularly to meeting the special educational needs of educationally deprived children (such as therapeutic, remedial or welfare services) and only where such specialized services are not normally provided by the nonpublic school" (S. Rep. No. 146, *supra*, at 12). See also 111 Cong. Rec. 5747-5748 (1965) (remarks of Reps. Carey and Perkins). Regulations require the recipient local educational agency to "exercise administrative direction and control over [the] funds and property" used in Title I programs (34 C.F.R. 200.70(c)) and specifically mandate that local educational agencies provide Title I services to nonpublic school children only by using public employees or contracting with a person or organization "independent of the private school and of any religious organizations" (34 C.F.R. 200.70(d)(1)). The regulations permit educational services funded by Title I to be provided on the premises of the nonpublic school only "[t]o the extent necessary to provide equitable services" to public and nonpublic school students and only if those services "are not normally provided by the private school" (34 C.F.R. 200.73(a) and (b)). A public educational agency "must keep title to and exercise continuing administrative control of all equipment and supplies * * * acquire[d] with [Title I] funds" (34 C.F.R. 200.74(a)).

3. This case concerns the largest Title I program in the nation, that operated by the Board of Education of the City of New York. This program has now been in operation for 18 years, and the facts concerning its operation have been developed in detail in the record of this case. Those facts are essentially undisputed (App., *infra*, 10a, 56a n.1.).

Approximately 13% of the over 300,000 students enrolled in Title I programs in New York City attend nonpublic schools, most of which are religiously oriented (App., *infra*, 7a; C.A. App. A32, A80-A81). Title I students are taught remedial reading, remedial mathematics, and English as a second language, and are provided a clinical and guidance program designed to enhance achievement in those subjects (App., *infra*, 10a-11a). In accordance with Title I and its implementing regulations (see S. Rep. 146, *supra*, at 12; 34 C.F.R. 200.73(b)), Title I funds are not used to provide a program to the students of a nonpublic school if that school is itself offering a similar remedial program.

Initially, the Board did not offer Title I instruction on the premises of nonpublic schools. Instead, it required nonpublic school students who wished to participate in Title I programs to travel to public schools after regular school hours. Attendance at these sessions was poor. The Board then decided to hold some Title I classes in the nonpublic schools but after regular school hours. App., *infra*, 7a. This approach proved unsuccessful for similar reasons: "both students and teachers were tired, * * * there was concern about the safety of children travelling home after dark or in inclement weather, and * * * communication between Title I teachers and other professionals and the regular classroom teachers of the nonpublic schools was virtually impossible" (*id.* at 8a).

The Board then considered holding the remedial classes for nonpublic school students in the public schools during school hours, but this plan was abandoned because of concerns that it would violate the New York Constitution (App., *infra*, 8a). In addition, a study showed that the transportation and other non-instructional costs that would have been incurred by conducting Title I classes for nonpublic school students at sites away from their schools would have amounted

to 42% of the entire Title I budget for nonpublic school children. In order to pay these costs, the Board would have had to deny Title I services to more than one-third of the nonpublic school students who were eligible for them (App., *infra*, 8a, 72a-73a).

After unsuccessfully "experimenting with [these] alternative programs" (App., *infra*, 71a), the Board decided, in 1966, to provide Title I instruction on the premises of nonpublic schools during school hours. All the teachers and other professionals who provide Title I services, with the exception of some physicians under special contract, are regular full-time employees of the Board. Teachers who are willing to teach Title I classes are assigned to nonpublic schools by the City. The Board does not inquire into teachers' religious affiliations when making assignments; the undisputed evidence is that the vast majority of the Title I teachers work in nonpublic schools with a religious affiliation different from their own. App., *infra*, 11a-12a, 74a. In addition, 78% of the teachers, and all of the non-teacher professionals, spend fewer than five days a week in any one school and work in more than one school in the course of the week.

The program of on-premises Title I instruction of nonpublic school students is designed to "'create[ ] the unusual situation in which an educational program may operate within the private school structure but be totally removed from the administrative control and responsibility of the private school'" (App., *infra*, 14a (citation omitted)). Title I teachers are issued detailed written instructions and oral instructions that emphasize that they are independent public service employees who are in no way responsible to the nonpublic school authorities. The nonpublic school principals are also informed of the requirement that the Title I teachers' role be kept distinct from the school's religious aspects. Title I teachers are instructed not to introduce any reli-

gious matters into their programs. They are also instructed not to engage in team teaching or cooperative instructional activities; they may consult with a nonpublic school teacher about a student's needs, but if they do they are not to engage in any religious discussion. App., *infra*, 12a, 74a.

Pursuant to instructions given by the Board to participating nonpublic schools, Title I teachers use classrooms that are specifically designated for Title I instruction and that are free from any religious symbols. The nonpublic schools are not reimbursed for the classroom space. Both the nonpublic schools and the Title I teachers are informed that the Title I teachers have sole responsibility for selecting students for the program. The materials used in the classes have no religious content. Moreover, the Board retains title to the materials and equipment used in Title I classes; the teachers are instructed to keep the materials locked in storage cabinets when they are not in use, and the materials are subject to an annual inventory. App., *infra*, 13a, 74a-75a.

Each Title I teacher is supervised by a field supervisor, employed by the Board, who is to make at least one unannounced visit a month to the Title I classroom. The field supervisors answer to the Board's program coordinators, who also make occasional unannounced visits. In addition, the Board holds monthly training sessions for those employees serving as Title I professionals. No Title I teacher, in the entire time that on-premises instruction has been provided, has complained that nonpublic school authorities were attempting to interfere in his work for religious reasons; nor is there any recorded complaint that a teacher was injecting religious matter into a class. App., *infra*, 13a-14a, 1256-1257.

4. This suit was brought in 1978 in the United States District Court for the Eastern District of New York by

six federal taxpayers. The plaintiffs alleged that the Constitution prohibits public employees from providing remedial education on the premises of religiously oriented nonpublic schools. They sought declaratory and injunctive relief against the operation of New York City's Title I program. Four individuals whose children attend private elementary schools in New York City and receive Title I educational assistance subsequently intervened as defendants (App., *infra*, 9a-10; C.A. App. A2, A3-A7).

The district court stayed proceedings in this case pending the outcome of another suit, also challenging New York City's program of on-premises Title I instruction, that was pending before a three-judge court. *National Coalition for Public Education & Religious Liberty (PEARL)* v. *Harris*, 489 F. Supp. 1248 (S.D.N.Y.), appeal dismissed for want of jurisdiction, 449 U.S. 808 (1980) (App., *infra*, 60a-103a). The three-judge court in *PEARL* upheld the constitutionality of the program. The parties to this case then stipulated that this case would be heard on the record developed in *PEARL*, as supplemented by various affidavits and documents (App., *infra*, 10a, 56a).

The district court granted summary judgment for the defendants (App., *infra*, 55a-57a). The court agreed with the reasoning of the three-judge court in *PEARL* and rejected the plaintiffs' argument that *Meek* v. *Pittenger*, 421 U.S. 349, 367-373 (1975), compelled the conclusion that the Title I program was unconstitutional (App., *infra*, 56a-57a):

> Simply put, the relevant equivalent of the extensive evidence derived from the many years of operation of the Title I program was not before the courts in *Meek*. * * *
>
> * * * [A]lthough arguably some of the circumstances of the title I program parallel the State program in *Meek*, the direct evidence demon-

> strates that the concerns of the *Meek* Court about the potential for the unconstitutional mingling of government and religion in the administration of this type of program have not materialized. Undoubtedly, the Supreme Court will not ignore the direct evidence of how Title I has functioned and operated in New York City's nonpublic schools for some seventeen (17) years in favor of plaintiffs' conjecture about the possibility of unconstitutional government activity * * *.

The court of appeals, relying principally on *Meek* v. *Pittenger*, *supra*, reversed (App., *infra*, 1a-54a). The court of appeals did not question any of the factual conclusions reached by the district courts that had considered New York's Title I program (see *id.* at 10a). Indeed, the court of appeals stated (*id.* at 4a):

> We have no doubt that the program here under scrutiny has done much good and that, apart from the Establishment Clause, the City could reasonably have regarded it as the most effective way to carry out the purposes of the Act. We likewise have no doubt that the City has made sincere and largely successful efforts to prevent the public school teachers and other professionals whom it sends into religious schools from giving sectarian instruction or otherwise fostering religion.

The court of appeals also noted that "[w]hile other ways of using Title I funds for the benefit of students in religious schools can be found, these * * * are almost certain to be less effective, more costly, or both" (*id.* at 52a) and remarked that it could understand why the district court and the three-judge court in *PEARL* "struggled to find constitutional justification for a program that apparently has done so much good and little, if any, detectable harm" *(ibid.)*.

The court nevetheless ruled, principally on the authority of *Meek*, that "the Establishment Clause, as it has been interpreted by the Supreme Court * * * con-

stitutes an insurmountable barrier to the use of federal funds to send public school teachers and other professionals into religious schools to carry on instruction, remedial or otherwise" (App., *infra*, 4a; see *id.* at 36a-39a, 50a-53a). The court of appeals interpreted *Meek* as creating a per se rule that the supervision needed to ensure that public employees do not further a nonpublic school's religious purposes necessarily creates "a constitutionally excessive entanglement of church and state" (*id.* at 36a (footnote omitted)). The court specifically stated that it was not ruling on "the merits of the argument" that the supervision of public school teachers in a nonpublic school need not create an unconstitutional degree of entanglement (*id.* at 33a); it made clear that it simply felt itself to be bound by the dictates of *Meek*. The court of appeals refused to consider the contention that the facts in the record about the actual operation of the New York program demonstrated that public employees can teach in religiously affiliated schools without endangering the values underlying the Establishment Clause; the court stated that this Court in *Meek* "was aware that programs having safeguards like the City's could be devised and might prove sufficient to prevent teachers and counselors from fostering religion" (*id.* at 37a n.16) but had nonetheless ruled that all such programs necessarily violate the Establishment Clause.

THE QUESTION IS SUBSTANTIAL

The court of appeals has invalidated a central feature of the nation's largest, most important, and most successful federal program for improving the education of disadvantaged children. Even though the court had before it an extensive and undisputed factual record, its decision rests not on an assessment of the actual operation of the program at issue but on *a priori* suppositions about the effects of allowing public employees to teach in nonpublic schools. Contrary to the court of ap-

peals, this Court's decisions do not establish a per se rule absolutely forbidding public employees from providing remedial instruction on the premises of religiously oriented schools. Moreover, the facts of this case furnish no basis for concluding that New York City's Title I program fosters a constitutionally impermissible degree of entanglement between church and state or violates the Establishment Clause in any other way. Further review is therefore warranted.

1. "Under the precedents of this Court a [measure] does not contravene the Establishment Clause if it has a secular * * * purpose, if its principal or primary effect neither advances or inhibits religion, and if it does not foster an excessive entanglement with religion." *Committee for Public Education and Religious Liberty* v. *Regan*, 444 U.S. 646, 653 (1980); see, *e.g.*, *Lemon* v. *Kurtzman*, 403 U.S. 602, 612-613 (1971). There is no question that the Title I program has the secular purpose of providing educational opportunities for disadvantaged children (see App., *infra*, 76a-77a); plaintiffs have so conceded (C.A. Br. 20). It is also clear that the Title I program does not have the principal or primary effect of advancing religion. Title I remedial instruction is provided to all school children, in public and nonpublic schools alike, on an equal basis. See *Mueller* v. *Allen*, No. 82-195 (June 29, 1983), slip op. 8-9. The undisputed record demonstrates that Title I teachers in New York City's nonpublic religiously oriented schools did not further the religious mission of those schools at any time; they taught secular subjects and there is no evidence that they ever injected religious material into their classes. Of course, the availability of on-premises remedial instruction may have made the religiously oriented schools more attractive to students and their parents than they would otherwise have been, but it is settled that that possibility does not make the program of on-premises instruction suspect under the Establishment Clause. See, *e.g.*, *Board of Education* v. *Allen*,

392 U.S. 236, 242 (1968); *Everson* v. *Board of Education*, 330 U.S. 1, 17 (1947).

As the court of appeals explicitly stated (App., *infra*, 38a), the sole basis of its holding was its conclusion that New York City's Title I program brings about excessive entanglement between the government and religiously oriented schools. The court ruled that constitutionally impermissible entanglement results from "the active and extensive surveillance which the City has provided" to ensure that Title I teachers do not aid the religious mission of nonpublic schools (*id.* at 39a).[4] But the only "surveillance" involved in New York City's Title I program is the supervision of public school employees by public education authorities. The City does not conduct any "surveillance" of persons subject to the authority of any nonpublic school (cf. *Lemon*, 403 U.S. at 614-621) or in any way involve itself in the "details of administration" of a religious institution (*id.* at 615, quoting *Walz* v. *Tax Commission*, 397 U.S. 664, 695 (1970) (opinion of Harlan, J.)). The requirements imposed on the nonpublic school by virtue of the fact that instruction takes place on its premises are unambigious and resemble those of other public regulatory programs, such as fire and building safety codes: the nonpublic school must maintain a classroom in a certain condition and must allow supervisors on the premises for unannounced inspections.[5] The City's supervi-

[4] It is at least ironic that the Establishment Clause should be deemed violated for the very reason that scrupulous care has been taken to guard against its violation.

[5] The Title I program involves certain other limited contacts between public employees and nonpublic school personnel—for example, they must discuss scheduling problems and other minor administrative details (see C.A. App. A55, A58) and consult about students' educational needs (see App., *infra*, 12a)—but these contacts would occur even if Title I classes were taught on the premises of public schools. Moreover, consultations about minor administrative concerns are most unlikely ever to implicate religion (see C.A. App. A58), and any public welfare

sion of the Title I teachers, by contrast, covers more facets of their day-to-day performance and may require the supervisors to make subjective judgments. But such supervision does not entangle church and state; it only "entangles" the public education authorities with their own employees.

It is true that one purpose of the supervision is to ensure that Title I teachers do not inject any impermissible religious material into their classes. But public school authorities routinely supervise all of their teachers partly for the purpose of ensuring that they do not improperly impose on their students their personal views on religion or other sensitive subjects. This Court has upheld off-premises remedial instruction, by public school teachers, of classes composed entirely of sectarian school students. *Wolman* v. *Walter*, 433 U.S. 229, 246-248 (1977). There is no justification for the court of appeals' conclusion that the mere fact that such a class is conducted on nonpublic school premises necessarily and inevitably means that the government's supervision of its own employees will involve an "entanglement" with religion.

Meek v. *Pittenger* should not be considered controlling in this case. *Meek* involved a state statute that provided for, among other things, remedial instruction by public school teachers on the premises of nonpublic schools. The Court invalidated this program on entanglement grounds, but its holding rested in significant part on the conclusion that the statute "create[d] a serious potential for divisive conflict over the issue of aid to religion—'entanglement in the broader sense of continuing political strife'" (421 U.S. at 372, quoting *Committee for Public Education and Religious Liberty* v. *Nyquist*, 413 U.S. 756, 794 (1973); see App., *infra*, 94a-95a n.12). This danger was present because state aid to nonpublic school students and state appro-

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agency that deals with a sectarian school student may have occasion to consult with his teachers.

priations for public schools were addressed by separate statutory schemes and considered by the legislature—in an annual appropriations process—independently of each other (see 421 U.S. at 352, 372). As a result, the amount of aid to be provided to nonpublic school students would have been a subject of recurring controversy, creating of repeated confrontation[s] between proponents and opponents of the * * * program [and] * * * political fragmentation and division along religious lines" (*id* at 372). Title I, by contrast, is a single statutory scheme that provides aid to students in both public and nonpublic schools according to a fixed rule of per-student parity. See 20 U.S.C. 3806(a). As a result, Title I does not focus debate on the amount of aid to be given to nonpublic school students. In its nearly 20 years of operation, Title I has not precipitated religious division in the political arena; the court of appeals did not suggest otherwise. The danger of "political entanglement" that was an important basis of the holding in *Meek* therefore does not call into question the validity of any Title I program.

More important, the state program at issue in *Meek* was challenged soon after it was enacted, and the record provided little information on how it was implemented. See App., *infra*, 96a-97a. The Court accordingly did not have an opportunity to determine whether a comparable program could be administered in a way that would prevent excessive entanglement.[6] In this case, however, the Court has before it a record demonstrating that New York City has avoided the dangers identified by the Court in *Meek*.

For example, a premise of the decision in *Meek* was that the remedial instruction would be offered under circumstances "in which an atmosphere dedicated to the

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[6] See also *Regan*, 444 U.S. at 661 (*Meek* did not hold "that any aid to even secular education functions of a sectarian school * * * is suspect since its religious teaching is so pervasively intermixed with each and every one of its activities").

advancement of religious belief is constantly maintained" (421 U.S. at 371). By contrast, in *Wolman* v. *Walter*, *supra*, the Court upheld the provision of remedial instruction to sectarian school students by public school teachers when "the services are to be offered under circumstances that reflect their religious neutrality" (433 U.S. at 247). Here, New York has taken care to offer Title I instruction only in circumstances that reflect religious neutrality.

Similarly, in *State ex rel. School District of Hartington* v. *Nebraska State Board of Education*, 188 Neb. 1, 195 N.W. 2d 151, cert. denied, 409 U.S. 921 (1972), the Nebraska Supreme Court upheld a Title I program that provided remedial instruction on the premises of a Catholic high school; Justice Brennan, concurring in the denial of certiorari, explained that "the school district * * * [has] no part whatever in the curriculum of the parochial school either by way of subsidy of its costs through financing of teaching or otherwise. The remedial reading and remedial mathematics courses * * * operate completely independently of that curriculum and of the Catholic school administration." 409 U.S. at 926. The record in this case shows that New York City's Title I program operates in the same way.

2. As we have noted, in *School District of the City of Grand Rapids* v. *Ball*, cert. granted, No. 83-990, this Court has agreed to review a question similar to that presented here in the context of a state program that resembles Title I in some, but not all, respects; the parties in *Grand Rapids* agree that there are "important differences" between Title I and the Grand Rapids program (Br. in Opp. 6; see Pet. 26). We have discussed the similarities and differences between the *Grand Rapids* program and Title I in the Brief for the United States as Amicus Curiae in *Grand Rapids* (83-990 U.S. Br. 25-30). As we explain there, a decision by this Court in favor of the parties challenging the state program at issue in *Grand Rapids* will not necessarily re-

solve the constitutionality of Title I instruction of the kind involved here. We believe that this case should be heard by the Court together with Grand Rapids.[7] The two cases will illumine each other and give the Court an opportunity to give comprehensive and informed consideration to the important issues presented by federal and state efforts to improve the education of American children on an across-the-board basis—one that does not discriminate against those who choose to exercise their constitutional right to send their children to religiously oriented schools. More particularly, we believe that there are important considerations that militate in favor of considering this case now on plenary briefs and argument rather than simply holding it for disposition in light of this Court's eventual decision in *Grand Rapids*.

a. The court of appeals' decision strikes down an integral aspect of a large and very important federal education program. It is therefore appropriate for the Court to review the court of appeals' decision without the additional delay that would be occasioned by an order remanding this case for further consideration in light of *Grand Rapids*.

Annual appropriations under Title I are on the order of $3 billion, and over five million students participated in Title I programs in a recent year (C.A. App. A251). As we have noted (see page , *supra*), when Congress

[7] In order to enable the Court to hear *Grand Rapids* without undue delay, we will be prepared to file a brief on the merits in this case by October 15, 1984. This should enable the Court, if it wishes, to hear oral argument in *Grand Rapids* and this case during the December argument session. The Chancellor of the Board of Education of the City of New York and the private defendants who intervened in the district court have also appealed from the judgment of the court of appeals and we are advised that they intend to file jurisdictional statements. We have been authorized to state that they too will be prepared to file briefs by October 15, should the Court wish to consolidate the three appeals.

enacted Title I it was aware that many disadvantaged students attend nonpublic schools, and it was concerned that they not be denied equal benefits because their parents chose to provide them that form of education. As this Court has said about Title I, "[t]he Congress * * * recognized that all children from educationally deprived areas do not necessarily attend the public schools, and * * * since the legislative aim was to provide needed assistance to educationally deprived *children* rather than to specific schools, it was necessary to include eligible private school children among the beneficiaries of the Act." *Wheeler* v. *Barrera*, 417 U.S. 402, 405-406 (1979) (emphasis in original; footnote omitted).

The public officials whom Congress made responsible for administering the Title I program at issue in this case concluded, after experimenting with alternative programs, that it would be self-defeating to attempt to provide remedial education to nonpublic school students in any way other than on the premises of the nonpublic school. See pages - , *supra*. The record of this case shows—and every court that has considered the record has agreed—that their conclusion was amply justified. The court of appeals itself recognized that as a result of its decision, many students who now receive Title I remedial instruction would no longer be able to do so (see App., *infra*, 4a, 8a, 52a).

The court of appeals' decision has, therefore, frustrated Congress's intentions in a direct way. This Court should review promptly—without a second round of proceedings in the court of appeals—a decision that has such a far-reaching impact and that is so inconsistent with Congress's design. Congress's principal purpose in enacting 28 U.S.C. 1252 (the statute under which we invoke the Court's jurisdiction) was to ensure prompt review by this Court of judicial decisions that affect many persons and frustrate Congress's intentions. See, *e.g.*, *Heckler* v. *Edwards*, No. 82-874 (Mar. 21, 1984), slip op. 11-12 & nn. 14, 16, 19; *McLucas* v.

DeChamplain, 421 U.S. 21, 31 (1975); H.R. Rep. No. 212, 75th Cong., 1st Sess. 2 (1937).[8]

b. The constitutionality of Title I remedial instruction on the premises of religiously oriented schools is a frequently recurring issue that has been before this Court before. See *Wheeler* v. *Barrera*, *supra*; *State ex rel. School District of Hartington* v. *Nebraska State Board of Education*, *supra*. See also *Flast* v. *Cohen*, *supra*; *Committee for Public Education & Religious Liberty* v. *Harris*, appeal dismissed for want of jurisdiction, 448 U.S. 808 (1980). Indeed, in *Wheeler*, the Court granted plenary review of this question, then determined that it was inappropriate to resolve the issue until a specific Title I program was before it. See page , *infra*. Title I programs in Kentucky and Missouri have also been challenged, on Establishment Clause grounds, in cases pending in district courts. *Barnes* v. *Bell*, Civil No. C-80-0501-L(B) (W.D. Ky,. filed Oct. 1, 1980); *Wamble* v. *Bell*, Civil No. 77-0254-CV-W-8 (W.D. Mo. filed Apr. 4, 1977). It seems likely that this important constitutional question, which arises so frequently, will at some point have to be resolved by this Court. This case is a particularly—perhaps uniquely—appropriate one for the Court to review for that purpose. It presents

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[8] The sponsor of the bill that became Section 1252 stated that its purpose was to "shut[ ] off a long period of suspense for the litigants in other cases" if a federal statute were declared unconstitutional (81 Cong. Rec. 3254 (1937) (remarks of Rep. Sumners); as we note (page , *infra*), other challenges to Title I programs are now pending. This Court has already held that a challenge to New York City's Title I program had to be brought before a three-judge court convened pursuant to 28 U.S.C. (1970 ed.) 2282—a statute enacted simultaneously with Section 1252 and serving comparable purposes (see page , note 1, supra)—precisely because a decision upholding a "constitutional attack on New York City's federally funded program[ ] * * * would cast sufficient doubt on similar programs elsewhere to cause confusing approaching paralysis to surround the challenged statute." *Flast* v. *Cohen*, 392 U.S. 83, 89-90 (1968).

the Establishment Clause question in the context of a major national program. Moreover, the court of appeals' ruling applies to the largest Title I program in the nation; the remedial education of one-fifth of all the nonpublic school students in the nation who receive Title I services will be affected by the decision in this case (see C.A. App. A32, A251). The issues have been considered by a three-judge court as well as by the district court and court of appeals below.

Perhaps more important, the record in this case provides a detailed—and essentially undisputed—portrait of the operation of an on-premises instructional program over a period of more than 15 years. In *Wheeler* v. *Barrera*, *supra*, this Court, after granting certiorari on the question of the constitutionality of on-premises Title I instruction, declined to resolve the issue in part precisely because it lacked concrete facts about the operation of any particular program (417 U.S. at 426):

> [If] on-the-premises parochial school instruction [is provided], * * * the range of possibilities is a broad one and the First Amendment implications may vary according to the precise contours of the plan that is formulated. For example, a program whereby a former parochial school teacher is paid with Title I funds to teach full time in a parochial school undoubtedly would present quite different problems than if a public school teacher, solely under public control, is sent into a parochial school to teach special remedial courses a few hours a week. At this time we intimate no view as to the Establishment Clause effect of any particular program.
>
> The task of deciding when the Establishment Clause is implicated in the context of parochial school aid has proved to be a delicate one for the Court. Usually it requires a careful evaluation of the facts of the particular case. See, *e.g.*, *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971), and *Tilton* v. *Richardson*, 403 U.S. 672 (1971). It would be wholly inappropriate for us to attempt to render an

> opinion on the First Amendment issue when no specific plan is before us.

In this case, the Court has before it not only a specific plan but a detailed record of how that plan was implemented over an extended period.

In general, the Court's decisions under the "entanglement" branch of Establishment Clause analysis rest on empirical judgments about several issues: how public employees will perform on the premises of religiously oriented schools; what means are available to education officials in their efforts to supervise teachers; how willing officials are to provide, and teachers are to accept, the necessary supervision; and whether these must be extensive and problematic dealings between public authorities and the nonpublic schools whose students are aided by the public program. The record in this case provides the Court with an unusually complete basis for making these empirical judgments.

c. Finally, the nature of adjudication under the Establishment Clause in cases involving aid to nonpublic school students makes it particularly appropriate for the Court to consider this case in tandem with *Grand Rapids*. As the Court has frequently noted, in this area the law must be particularly sensitive to the specific facts of the program at issue, and doctrine develops on a case-by-case basis, not in broad strokes. See, *e.g.*, *Lemon*, 403 U.S. at 624-625; *Regan*, 444 U.S. at 662; *Nyquist*, 413 U.S. 756, 761 & n.5 (1973).

By considering this case and *Grand Rapids* together, the Court will be afforded a more complete view of the "range of possibilities" (*Wheeler*, 417 U.S. at 426) of on-premises remedial instruction. As a result, the Court will be able to make its decision on the basis of greater information and will be able to provide more complete guidance to lower courts concerning which aspects of a program are significant and how far the principles of decision should extend. By contrast, a decision in *Grand Rapids* alone may leave unresolved the constitutional questions that the court of appeals' decision

raises about the program that has been challenged in this case.

CONCLUSION

Probable jurisdiction should be noted. We ask that the Court schedule the case for oral argument in tandem with No. 83-990, *School District of the City of Grand Rapids* v. *Ball*, and we are prepared to file our brief on the merits on an an accelerated basis to the end that this may be done without undue delay.[9]

Respectfully submitted.

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AUGUST 1984

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[9] As we explained (see page , note, *supra*), all of the parties appealing from the court of appeals' decision are prepared to file a brief by October 15, 1984, in time to allow the Court to hear oral argument on this case (and *Grand Rapids*) during the December argument session.

U.S. Department of Justice
Office of the Deputy Attorney General

8/17

To: John Roberts

From: Roger Clegg

Attached is some background information on the crime legislation. The main purpose of this document is to explain what the House is and isn't doing, and what the Department thinks of what it is and isn't doing.

Our public affairs people are sending this to your public affairs people, and Tex is sending a copy to Ciccòni.

POINTS TO MAKE IN DISCUSSING CRIMINAL LAW REFORM EFFORTS

First, as to the progress of criminal law reform in both houses, the Senate has acted, but the House has not. The Senate has passed a comprehensive, 46-part crime package by the overwhelmingly vote of 91 to 1. It has also passed by wide margins separate bills dealing with habeas corpus, the exclusionary rule, and capital punishment. The Administration strongly supports each of these bills. Meanwhile, in the House, the leadership has taken a piecemeal approach that so far has been unproductive, and in some respects counterproductive.

Second, given recent polls showing that crime ranks among the foremost concerns of American voters, it is no wonder that the Speaker of the House and the Chairman of the House Judiciary Committee have finally agreed to process several of the bills that have been stuck for months at the committee stage. These include House proposals on bail, sentencing, forfeiture, drug diversion, foreign currency transactions, and the insanity defense. The issues raised by these proposals deserve the fullest debate on the House floor. Debate should not be cut short by parliamentary techniques.

Third, the remarkable fact is, however, that the leadership desires to process only these 6 items. There are no fewer than 27 items upon which the House has yet to act this year, and which evidently the leadership believes can continue to sit in committee in-boxes. These include amendments concerning labor racketeering, violent crime, serious non-violent offenses, and various procedural issues. They also include habeas corpus, the exclusionary rule, and capital punishment. Reform of the federal criminal laws should be comprehensive, covering all of the laws in need of repair. The urgency is for the House to process each and every proposal, and to consider, as the Senate has, every area of the law where criminals now prosper at the expense of society.

Fourth, as to the substance of legislation under active consideration in the House, a few proposals parallel the ones passed by the Senate and do promise to achieve significant reform. One of these, for example, is the proposal on forfeiture. Most of the proposals under consideration would, however, fall short of accomplishing the necessary reform. And some would be counterproductive -- they would only worsen the imbalance in the law that currently favors the rights of criminals over those of their victims and society.

One of these is the sentencing bill reported by the House Judiciary Committee. The basic problem is that this bill would weaken the sanctions of the current system. For example, it would retain a parole system, facilitating release of felons long before they finish serving their time. Also, it would make sentencing more lenient by, among other things, sharply limiting sentences for persons convicted of multiple offenses. Too, it

would make guidelines less binding upon the sentencing judge. Further, it would allow defendants to harrass victims by giving them the right to subpoena witnesses. The bill would also allow defendants with previous felony convictions to deny that such convictions ever occurred. In its current form, the House sentencing bill would have to be considered not reform, but anti-reform. The sentencing provision in the Senate's comprehensive crime package, by contrast, constitutes authentic reform, and it deserves full consideration in the House.

Fifth, finally, and obviously, there can be no criminal law reform until the House of Representatives finally does act. Yet it is not just action of any kind that is needed. Reform worthy of the name must be comprehensive in scope and must address the serious defects in our federal criminal law. The American people deserve nothing less than the best efforts of both houses of Congress.